91-393

NUMBER _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

L. MICHAEL MAJESKE
PETITIONER

VERSUS

BOARD OF TRUSTEES FOR
REGIONAL COMMUNITY COLLEGES
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Did the District Court err in entering judgement on the ground of statute of limitations?

2) Did the District Court err by assuming applicability of the doctrine of res judicata?

3) Did the Appeals Court err in affirming the District Court ruling of December 14, 1990?
Is constitutionality involved?

LIST OF ALL PARTIES TO THIS PROCEEDING

L. Michael Majeske
Plaintiff/Petitioner

Board of Trustees for Regional Community Colleges
Defendant/Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

L. MICHAEL MAJESKE, PETITIONER

V.

BOARD OF TRUSTEES FOR REGIONAL COMMUNITY COLLEGES RESPONDENT

PETITION FOR WRIT OF CERTIORARI SECOND DISTRICT COURT APPEALS

The petitioner, L. Michael Majeske, respectfully prays that a writ of certiorari issue to review the judgement of the Second District Court of Appeals entered on May 15, 1991.

OPINIONS BELOW

"...judgement be and hereby is affirmed for substantially the reasons set forth in Judge Cabranes' endorsement..." (Second Circuit Court of Appeals, May 15, 1991)

"...cause of action accrued on June 5, 1985...filed this action against defendant over four years later, on August 31,1989." (judge Cabranes, December 14, 1990)

Accordingly, it would be barred by the doctrine of res judicata."
(Judge Cabranes, December 14, 1990)

JURISDICTION

Rule 10, .1 (a) "When a United States Court of Appeals has...so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court..."

Date of entry of a lower court judgement: December 14, 1990.

Date of entry of appeals court judgement: May 15, 1991.

This action is brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. Section 623 (a) and 29 U.S.C. Section 630 (b), and the Age Discrimination Claims Assistance Act of 1988. Jurisdiction in the United States Courts to hear this matter is granted by U.S.C. Section 626 (c) which also grants to the plaintiff a right to a trial by jury of any issue of fact in this action for recovery of amounts owing as a result of violation of this act, regardless of whether equitable relief is sought by the plaintiff.

CONSTITUTIONAL PROVISIONS

Federal Age Discrimination in Employment Act (AEDA) and the Age Discrimination Claims Assistance Act of 1988 (Claims Act), Public Law 100-283, 102 Stat.78.

The injured party has a right to hearing by jury. The plaintiff may not be forever barred from the Courts in pursuing grievances related to continuing age Discrimination.

CONCISE STATEMENT OF THE CASE

On April 8, 1987, the plaintiff, through an attorney, David E. Kamins, filed a complaint dated March 7, 1987 in the Connecticut District Court (H87-270-AHN), naming as defendants the Board of Trustees, Greater Hartford Community College, Conrad Mallett and Arthur Banks. The plaintiff was and is employed by the Board of Trustees at G.H.C.C. Because of the incompetence and negligence of Attorney Kamins the case was dismissed for lack of prosecution. Kamins was subsequently disbarred from the practice of law in Connecticut.

The plaintiff filed a MOTION TO REOPEN AND TO AMEND THE COMPLAINT on May 31, 1988, which was denied and lost appeal.

Discrimination against the plaintiff continued, and the plaintiff filed a second action, this time naming only the Board of Trustees as defendant and showing new cause of action resulting from the annual Discrimination by the defendant against the plaintiff by failure to promote the plaintiff while promoting younger, less experienced, and even incompetent persons (H-89-491-JAC).

This second case also was decided for the defendant and was erroneously upheld in the appeals court (91-7060).

Concise answers to the questions on page i of this writ are as follows:

ARGUMENT I: THE DISTRICT COURT ERRED IN ENTERING JUDGEMENT ON THE GROUND OF THE STATUTE OF LIMITATIONS.

In its endorsement ruling dated December 14, 1991, the Court stated that the "Plaintiff's cause of action "accrued" on June 5, 1985 when the alleged discriminatory action occurred." This is false for the following reasons: (a) The court cited some vague incidents from a previous case which has no relation with the present case. (b) The respondent discriminates continually on an annual basis and the latest example of his discrimination occurred on or about May 1, 1989, at which time the respondent discriminated by failing to promote the petitioner for the following year, although the petitioner was more than fully qualified and deserving of the promotion to become effective in the following academic year. The refusal of the District Court to hear the second case constitutes dismissal with prejudice of the first case. The injured party is the oldest, most experienced person in the college and has properly applied for promotion in accordance with procedures specified in the working contract between the Board of Trustees and the Union, year after year. Not only has the respondent failed to promote the petitioner, but he has promoted young, incompetent persons far beyond their capabilities, with resultant harm to the students, the State, and the Nation as well as to the petitioner.

Previous cases show that any doubt should be resolved for the plaintiff as in Schroeder v. Daytona-Hudson Corp "...age discrimination case...not barred..." and in DeMalherbe v. International Union of Elevator Constructors, "...Court should apply the longer as a matter of policy...", and in Awbrey v. Great Atlantic and Pacific Tea Co., Inc., "United States has an interest in a limitation period that is sufficiently generous to preserve this remedial spirit of federal civil rights action."

The answer to question number one on page i of this writ is therefore an unqualified, "YES".

ARGUMENT II: THE DISTRICT COURT ERRED BY ASSUMING APPLICABILITY OF THE DOCTRINE OF RES JUDICATA.

The earlier case, Majeske v. Board of Trustees, Greater Hartford Community College, Conrad Mallett and Arthur Banks, was never tried but rather was dismissed for reason of failure to prosecute. The reason for failure to prosecute was the incompetence of the lawyers representing the plaintiff. They are David E. Kamins and M. Daniel Friedland, both whom were subsequently disbarred from the practice of law in Connecticut.

The Court cannot hold the petitioner responsible for the failings of the attorneys when the Court sanctioned them to practice law in its own courtrooms. Neither can the Court thereby forever ban the petitioner from seeking redress of his grievances on any subsequent charge against the respondent who continues to practice unlawful discrimination against the petitioner year after year.

Even though the earlier case was never adjudicated on its merit, and hence cannot satisfy the definition of "RES JUDICATA", the second case does not deserve the same banishment from the Courts because the second case is based upon a second violation of the discrimination statutes and is unrelated to the first, although similar.

Many cases cite the necessity of judgement on merit in order to apply res judicata, for example, Hurt v. Pullman,

"...only if all four elements are present...", Kemp v. Birmingham News, "...must have been a previous final judgement on the merits...", and Trujillo v. State of Colorado, "...employment discrimination suit...did not constitute an adjudication on the merits...".

The answer to the question number two on page i of this writ is therefore an unqualified, "YES".

ARGUMENT III (a): THE APPEALS COURT DID ERR IN AFFIRMING THE DISTRICT COURT RULING OF DECEMBER 14, 1990.

The American public is well aware of the increasing heavy burdens being placed upon every segment of the Court system in this country, both civil and criminal, in addition to bankruptcy, probate, etc. Ours is a litigious society, unmatched anywhere else in the world for sheer volume of number of cases. It is not surprising therefore to find that on occasion a case is not given all the consideration and reflection it may seem to merit.

The labor contract between the plaintiff and the defendant clearly specifies that in case of discrimination such as this one, the only recourse for the grievant is a Federal or State Court of Law. No hearing has ever been granted to the plaintiff in the decades-long continual discrimination against the plaintiff. It appears as though the Courts do not favor whistleblowers.

ARGUMENT III (b): CONSTITUTIONALITY IS INVOLVED IN THIS CASE because the plaintiff is being unlawfully denied access to the Courts for the redress of his

grievance. The plaintiff would like to have a jury trial to which he is entitled, but has not yet been afforded a hearing even before a solitary judge.

For these reasons and for the reasons set forth on the previous pages, the answers to both parts of question number three on page i of this writ are an unqualified "YES".

AMPLIFYING ARGUMENTS:

In August, 1969, the plaintiff was hired by the defendant as an Instructor of Mathematics, with the clear understanding that he would be promoted to at least Assistant Professor after his first year of service. The defendant failed to promote the plaintiff until 1977 and has failed to promote the plaintiff since that time.

The plaintiff is the oldest, most experienced person in the college and has properly applied for promotion in accordance with the procedures specified in the working contract between the Board of Trustees and the Union, the Congress of Connecticut Community Colleges, year after year. Not only has the defendant failed to properly promote the plaintiff but he has promoted young, incompetent persons far beyond their capabilities with resultant harm to the students, the State and the Nation as well as the plaintiff.

The defendant has no means whatever to assure that competency of any of his employees exists or is maintained. In spite of standards for promotion spelled out in the working agreement between the defendant and the union, promotions are based upon politics and favoritism, rather

than on ability or merit. No other person in the entire state-wide community college system has been discriminated against as has the plaintiff.

The plaintiff was unfairly treated by both the Commission on Human Rights and Opportunity and by the Equal Employment Opportunity Commission (Appendix A, B) who both stated that no evidence existed when in fact overwhelming evidence did exist.

The above evidence was summarized in an eighteen page report titled, "DEVIATION AND DISCRIMINATION", which was submitted to Judge Alan Nevas. That report contained tables and charts showing conclusively by means of statistics that the plaintiff was indeed discriminated against by the defendant/respondent. The raw data for the report was obtained from the defendant's own official files, for which use the plaintiff was charged a considerable sum of money. A nine page supplement to that report, presented to Judge Jose Cabranes, contained additional data and substantiated the amount claimed.

Both the District Court and the Appeals Court ignored the overwhelming evidence contained in the report and its supplement but focused their attention improperly on irrelevant material pertaining to a prior unrelated but similar case.

No explanation (except a single memorandum) has ever been offered by the respondent to the petitioner's inquiries as to why he has been discriminated against for two decades. That memorandum, written by the petitioner's immediate superior and distributed to various

administrators, was false and slanderous in that it claimed that the petitioner is a poor-quality teacher. The petitioner is prepared to prove to any Federal jury the falseness of that accusation. For the respondent to use that accusation to justify its past discrimination is tantamount to condemning an innocent person to a lifetime of shame and poverty without a trial or a hearing of any type.

Irreparable harm is being done to the students, the state, and the nation because of discrimination against an able competent teacher such as the plaintiff, while young incompetent persons are promoted beyond their capabilities.

The damages sought by the petitioner are detailed in the petitioner's writ to Judge Cabranes, dated December 9, 1989.

The plaintiff will supply proof of all the above in his brief upon the grant of this petition.

CONCLUSION:

For the foregoing reasons the plaintiff prays that the judgement of the United States Supreme Court be to grant the plaintiff's petition for a Writ of Certiorari, and to thereby permit the plaintiff his right to a judicial or jury hearing to which he has heretofore been improperly denied.

RESPECTFULLY SUBMITTED,

L. Michael Majeske
Plaintiff/Petitioner PRO SE
263 Grindlebrook Road
S. Glastonbury, CT 06073
(203) 633-0827
August 15, 1991

APPENDIX A: (Editorial from the Hartford Courant)

Kid Gloves for CHRO

The governor's four-member task force investigating the state Commission on Human Rights and Opportunities could miss the opportunity to reform the errant civil-rights agency.

The task force's watering down of a hard-hitting report drafted by its chairman and staff indicates a lack of interest in truth and improvement.

For example, the panel apparently didn't like a finding that CHRO's standard of evidence was unclear and probably led to the improper dismissal of legimate complaints. This finding was changed to say only that the standard was "unclear and should be defined." But the rewriters refused to recommend a clear definition even though it would be helpful to state officials with the power to reform CHRO.

The task force also eliminated a preliminary conclusion that the production quotas imposed by CHRO's managers have pressured investigators into closing or dismissing discrimination cases prematurely.

Why the reluctance to tell it like it is?

Testimony gathered in public hearings, the draft report that task force chairman Rudolf P. Arnold helped mold, and an investigation in May by The Courant have left little doubt that the civil-rights agency has become a production-oriented bureaucracy. The other members of

the task force are Julia M. McNamara, president of Albertus Magnus College in New Haven, the Rev. Robert W. Perry, pastor of Union Baptist Church in Stanford, and Hartford lawyer Abner W. Sibal.

CHRO's sorry record during the past five years includes granting hearings only to about 1 percent of complaints, taking six months to begin an investigation and 500 days to close the average case.

The civil-rights agency has lost sight of its mission, which is to protect Connecticut citizens from discrimination based on race, sex, religion, age and disability.

A task-force report that beats around the bush will only create the suspicion that it is trying to cover up CHRO's faults.

APPENDIX B: (News item from the Hartford Courant)

Bias Claims Handling Hit

Washington - The Equal Employment Opportunity Commission did not fully investigate up to 82 percent of job discrimination claims over a three-month period last year, the General Accounting Office reported Tuesday.

Rep. Augustus Hawkins, D-Calif., who ordered the GAO study as chairman of the House Education and Labor Committee, said, "I find it outrageous that there are people across the country who may have a legimate job discrimination claim denied because the EEOC mishandled the case, didn't enforce the law or was more concerned with reducing paper work than with protecting claimant's civil rights.

The GAO reviewed investigations of cases closed between January through March 1987 in which no evidence of discrimination was found. The GAO said 41 percent to 82 percent of the charges closed by six EEOC district offices and 40 percent to 87 percent of charges closed by five state agencies were not fully investigated.

APPENDIX C: ENDORSEMENT RULING

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LEONARD MICHAEL MAJESKE

v. CIVIL NO. H-89-491 (JAC)

BOARD OF TRUSTEES FOR
REGIONAL COMMUNITY COLLEGES

ENDORSEMENT RULING

Plaintiff in this section alleges that defendant discriminated against him by failing to promote him to full professor in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 623(a) and 29 U.S.C. 630(b) ("ADEA"). Defendant moves the court for a summary judgement on the ground that plaintiff's complaint is barred by the applicable statute of limitations.

It appears that this action is substantially identical to one dismissed in 1987 by Judge Alan H. Nevas. See Leonard Majeske v. Board of Trustees, Greater Hartford Community College, et al., Docket No. H-87-270 (AHN) (D. Conn. July 14, 1987). Accordingly, it would be barred by the doctrine of res judicata. Assuming for the argument only that the action is not barred by the doctrine of res judicata, it is clear that judgement must enter for the defendant because the action would nevertheless be barred by the applicable statute of limitations.

The ADEA does not contain its own statute of limitations. Rather, 29 U.S.C. § 626(e) (1) provides that U.S.C. § 255 shall apply to ADEA actions. And § 255 provides in pertinent part that

> [a] action . . . to enforce any cause of action . . . may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within years after the cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued.

The "filling limitations period [] commence[s]" at the time the "alleged discrimination occur[s]." Delaware State College v. Ricks, 449 U.S. 250, 258 (1980). The period ends when the plaintiff "commences" the action. 29 U.S.C. § 255. In an individual action such as this, commencement of an action is deemed to occur when the plaintiff files the complaint. 29 U.S.C. § 256(a).

Plaintiff's cause of action "accrued" on June 5, 1985, when the alleged discriminatory action occurred. Plaintiff filed this action against defendant over four years later, on August 31, 1989. Although there were some administrative efforts to settle the dispute between those two dates, such administrative proceedings do not affect the running of the statutory period. See Unexcelled Chemical Corp. v. United States, 345 U.S. 59, 65-66 (1953). Thus, even assuming for the argument that the cause of the action arose out of a "willful violation," the applicable statute of limitations had clearly run before plaintiff filed his complaint.

There is no evidence to justify the application of the doctrines of equitable tolling or equitable estoppel. See Cerbone v. International Ladies' Garment Workers' Union, 768 F.2d 45, 48-50 (2d Cir. 1985) (Newman, J.). Plaintiff was clearly aware of the accrual of his cause of action and of the applicable limitations period for filing. Indeed, he had been notified by letter from the Equal Employment Opportunity Commission dated October 27, 1986 that a private suit must be filed within two years of the alleged discriminatory action or within three years in the case of a willful violation - that is, within two or three years, respectively, of the date the action "accrued" (June 5, 1988). See Defendants' Memorandum in Support of Motion for Summary Judgement (filed November 20, 1990) at Exhibit C. Moreover, there is no evidence to suggest that defendant at any time caused plaintiff to delay bringing this lawsuit.

CONCLUSION

For the various reasons noted above, defendant's motion is GRANTED and judgement shall enter for defendant.

It is so ordered.

Dated at New Haven, Connecticut, this 14th day of December 1990.

Jose A. Cabranes
United States District Judge

APPENDIX D: MOTION FOR RECONSIDERATION

UNITED STATES COURT OF APPEALS
for the
Second Circuit

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the tenth day of June, One thousand nine hundred and ninety-one.

MAJESKE

v.

BOARD OF TRUSTEES

A motion having been made herein by the appellant pro se, L. Michael Majeske, for reconsideration.

Upon consideration by the panel that decided the appeal, it is Ordered that said motion be and it hereby is DENIED.

For the Court

Elaine B. Goldsmith, Clerk

APPENDIX E: MANDATE

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United states Courthouse in the City of New York, on the 15th day of May, one thousand nine hundred and ninety-one.

PRESENT:

HONORABLE GEORGE C. PRATT,

HONORABLE ROGER J. MINER,

HONORABLE FRANK X. ALTIMARI,
Circuit Judges

LEONARD MICHAEL MAJESKE,
Plaintiff-Appellant,

- against - Docket No. 91-7060

BOARD OF TRUSTEES FOR REGIONAL COMMUNITY COLLEGES,
Defendant-Appellee

This appeal from a judgement of the United States district Court for the District of Connecticut, Jose A. Cabranes, Judge, came on to be heard on the transcript of record and was submitted.

ON CONSIDERATION WHEREOF, it is now ordered that the judgement be and hereby is affirmed for substantially the reasons set forth in Judge Cabranes' endorsement ruling of December 14, 1990.

George C. Pratt, U.S.C.J.

Roger J. Miner, U.S.C.J.

Frank X. Altimari, U.S.C.J.

Issued as MANDATE: June 18, 1991